CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

OPELOUSAS.

JULY, 1879.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,
HON. A. DEBLANC,
*HON. W. B. SPENCER,
HON. E. D. WHITE,
} *Associate Justices.*

No. 1055.

HORTENSE DUPÉRIER VS. POLICE JURY OF IBERIA PARISH.

Where the police jury of a parish, in obedience to a judgment of court in favor of a certain party, levy a tax to satisfy the judgment, the party will not be entitled to a mandamus to compel the jury to levy another tax to satisfy the judgment, because the partial collections from the first tax were insufficient, until he shall have proceeded against the tax collector to compel him to collect the whole of the assessment and levy of the first tax.

The execution of a judgment of this court directing the police jury of a parish to levy a certain tax, cannot be affected by a subsequent act of the legislature, limiting the power of police juries to impose taxes.

APPEAL from the Third Judicial District Court, parish of Iberia. *Fontelieu*, J.

J. A. Breaux for plaintiff and appellant.

W. F. Schwing for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. This is a proceeding by mandamus to compel the police jury of Iberia parish to place upon its estimate of expenses the

*Justice Spencer being absent took no part in these decisions.

unpaid residue of the plaintiff's judgment against the parish, and to levy a tax sufficient to pay the same. The tax assessor is made a party defendant also.

The plaintiff obtained a judgment against the defendant in 1876. Duperier v. Pol. Jury Iberia, 28 Annual, 613. Under that judgment the defendant in that year levied a tax of three mills on each dollar's valuation of property on the roll of 1875 to pay it. A portion of this tax was collected, but not all, and therefore not enough to satisfy the judgment. The object of this mandamus is to compel the levy of another and additional tax on the roll of 1877 to pay this unsatisfied residue. We do not think she is entitled to it at present.

This process of making a part of the tax-owers bear all the burdens of the government is not confined to Iberia parish. A tax of three mills was presumably sufficient, if collected, to discharge the debt. A part of those who owe taxes pay them. Others do not, and are not made to pay. A new and additional tax is laid to pay the residue of the debt. A part pay that—the same that paid the first—and the delinquents repeat their delinquency. Not enough is yet collected, and this tax levying goes on *ad infinitum* or until the repeated payments by the tax payers extinguishes the debt that should have been borne proportionately by all the tax-owers. This is the root of half our wo.

The plaintiff should have proceeded against the tax collector to compel him to collect the whole of the assessment and levy of the three mill tax, which had been made for the express purpose of paying her judgment. The law provides ways and means for the collection of taxes, and until these are exhaused, the plaintiff or relator cannot rightly demand other process for the enforcement of her claim than that already given, and which the police jury have endeavoured to effectuate by complying with the mandate of this court to levy a tax to pay it.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

The plaintiff's main object in applying for a rehearing is to have us pass upon the question presented in the pleadings—whether the collection of the tax necessary to pay her judgment can be enforced, if that tax, added to others levied in same year, shall exceed the maximum limitation of taxation for that year.

The plaintiff's judgment was rendered in 1876, and the decree of this court then made directed the defendant to levy a tax sufficient to pay it. The subsequent passage of a law, limiting parochial taxation, can have no effect upon that judgment. The police jury will be com-

pelled to pay it by legal process, if it turns out that the levy of the tax of three mills on the roll of 1875 is insufficient, but all the means at command to force the tax collector to proceed against delinquents on that roll must be first exhausted. Suits are not necessary to compel the payment of taxes. A more summary process is the seizure of the property of the delinquent, and its forced and speedy sale, for which the law has furnished ample warrant, and has prescribed the forms of such proceeding in its several stages.

The rehearing is refused.

No. 1065.

STATE EX REL. H. SCHORTEN, AGENT, VS. THE PRESIDENT OF THE BOARD OF SUPERVISORS, ETC.

The President of the Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College can not be compelled to warrant on any fund to pay a debt of either of the two former corporations, known respectively as "the Louisiana State University" and "the Agricultural and Mechanical College."

A mere stated account between the Superintendent of the Louisiana State University and Agricultural and Mechanical College, and one of the Professors employed in that institution, signed by the Superintendent, is not such conclusive proof of the amount due the Professor as would enable the latter to mandamus the President of the Board of Supervisors of the institution to warrant for the amount, even if the President was authorized to draw such a warrant.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

John H. Halsey for relator and appellant.

John H. Lamon, District Attorney, for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. Stephen Anthanasiades claims a salary as professor of the Greek language in the Louisiana State University and Agricultural and Mechanical College. The relator is his assignee or agent. The sum claimed is $3,785.61 for services rendered during 1872—1875 inclusive. The General Assembly appropriated $11,550.00 at its last session for the support and maintenance of the beneficiary cadets at the Louisiana State University in the year 1873 in accordance, the act says, with an act of the extra session of 1870. There is also alleged to be due that school $18,000.00 of accrued interest on the Seminary Fund. The relator seeks to compel the Governor of the State, who is the President *ex officio* of the Board of Supervisors, to warrant in his favor upon either or both of these funds to pay his salary.

This Seminary Fund arises from the sales of land donated by Congress for the support of a Seminary of Learning in this State. An institution existed here bearing that name, but it appears to have been changed to the Louisiana State University, which must not be confounded with the University of Louisiana. Another institution was called the Agricultural and Mechanical College, and these two were united or consolidated under the verbose designation above set out.

The Act consolidating or uniting these two separate institutions does not authorize or direct the Supervisors, or their President, to warrant for any of the debts of either of the corporations previously existing. The omission seems to have been studiously made, and we must infer that its object was to relieve the supervisors of the present Institution from the obligation of warranting for debts of a defunct corporation, of which they were presumably ignorant, and thus remit the creditors to their ordinary actions, in which the debt must be proven, and the adjudication of a court obtained thereon.

Even if this were not so, the appropriation made in 1879 must be of the revenues of 1873. The legislature has no authority to appropriate any portion of the revenues of 1879 to pay the expenses or to meet the deficiences of 1873, and unless there are funds in the treasury, derived from the revenues of 1873, or to be hereafter realized from those revenues, there will be no fund upon which to warrant.

But there is another ground fatal to the relator's right to this writ. He assumes that because Col. Boyd stated an account between the Institution and the professor, signing the same in his quality of Superintendent, that this is of itself conclusive evidence of the indebtedness of the Institution, and no inquiry of its correctness is needed or can be had. What law gave to the Superintendent the power to bind the Institution legally and irrevocably by his acknowledgment of an indebtedness? Where does the statute impart to an account stated by him the quality of finality and completeness, so as to preclude all dispute of it by the Institution?

The relator seems to have assimilated the conduct of the financial affairs of this Institution to the conduct of the same affairs of the State. Under the Act incorporating the "Seminary of Learning," and under the subsequent Act changing the name to the "State University," the President or Vice President could warrant, but because he was the officer designated to draw a warrant, was it ever supposed that he was bound to draw one for whatever sum the Superintendent might choose to recognise as a debt due by the institution? The Auditor of Public Accounts of the State may be compelled to draw a warrant for fees which a judge and clerk certify to be correct and due, Parker v. Robertson, 14 Annual, 246, but that is because the law makes that certificate

conclusive evidence of the debt. The same is true of the Comptroller of the city of New Orleans and for the same reason. Pinac v. Mount, 21 Annual, 352. But it will not be true of this Institution until the law imparts to a stated account of its Superintendent the same force, quality, and effect that is given to a certificate of those officers whose duties are adjudicated in the above decisions.

It follows therefore, even if the authority to draw was conferred upon the President by the Act of 1877, or if it was made his duty to draw warrants when money was to be obtained from the State treasury, he is not obliged to draw for any and every sum that the Superintendent may certify to be due, and therefore if he refuses to draw, he is not compellable by mandamus to do it. Nowhere, and under no circumstances, does any statute, incorporating or regulating this Institution under any of its Protean forms or numerous *aliases*, make the certificate of the Superintendent, or his stated account, full, final, and complete evidence of a debt of the Institution, and therefore parties who hold claims against it are not entitled to proceed to enforce their payment by a mandamus, as was done against the State or a municipal corporation in the cases cited by the relator.

Judgment affirmed.

No. 1036.

MARAIST, SYNDIC, VS. GUILBEAU, ADMINISTRATOR.

The homologation of an account of an administrator by the clerk of the court is not a judgment in the sense of article 1053 of the Code of Practice, and hence is not required to be revived. A debt embraced in such an homologated account is not therefore barred by the prescription of ten years.

Placing a debt on his account by an administrator, and asking for authority to pay it, is an acknowledgment of its correctness, and prescription ceases thenceforth to run on it, while he is in office.

Any creditor of a succession, whose claim has not been prescribed, may demand an account from the administrator.

APPEAL from the Parish Court of St. Martin. *Bassett*, J.

F. Voorhies for plaintiff and appellant.

Mouton & Martin for defendant and appellee.

The opinion of the court was delivered by

MARR, J. In a suit between the same parties, and for the same cause of action, we decided at the last term that plaintiff could not proceed by rule against the administrator to enforce the payment of the debt due him by the succession of which defendant is administrator. We refer to that decision, 30 An., 1089, for a statement of the facts.

After that decision was rendered, which affirmed the judgment of the parish court, dismissing the rule, plaintiff proceeded by petition in the parish court against the administrator to compel him to render an account of his administration. The petition charges that all the property, movable and immovable, of the succession has been sold; that more than a year has elapsed; that the administrator has filed no tableau of his administration, and has taken no steps to settle with the creditors; and that plaintiff is a recognized creditor for the sum of $1,590 07, besides interest.

Defendant set up the prescription of three, five and ten years, by way of exception, and also in his answer. The parish judge held that plaintiff was a judgment creditor, in virtue of the homologation by the clerk, of the account in which the debt of plaintiff was recognized; that more than ten years had elapsed since that order of homologation; that this judgment had not been revived as required by the act of 1853, R. C. C., art. 3547; and that it was barred.

In the case between the same parties, 30 An., we held and decided that the order of homologation by the clerk was not a judgment in the sense of article 1053 of the R. C. P. The most solemn homologation of an account after contest, is a judgment only with respect to the funds to be distributed under that account; and, as we said, 30 An. 1091, the homologation of the account in this case was not a judgment in favor of the creditors represented by Maraist, because there was no hope or possibility of their receiving a single dollar of the funds distributed under that account.

For the second time, therefore, we are compelled to overrule the decision of the parish judge in this case, and to hold that the order of homologation is not such a judgment as the law requires to be revived; and that the debt is not barred by the lapse of ten years from the date of that order.

The only remaining question is whether the right of Maraist to demand an account has been barred. Where the debt is acknowledged by the administrator, prescription is interrupted, and it ceases to run so long as the administrator continues in office. Article 985 of the C. P. seems to require the acknowledgment of the administrator to be *written* on the evidence of the debt or on a paper which he shall annex to it; but in the succession of Yarborough, 16 An. 260, 261, this court, construing articles 984-5-6-7 of the C. P., held that a letter, written by the authorized attorneys of the administrator sufficed; and that the requirements of article 985 are not sacramental. We concur in the views expressed in that case; and we hold that a judicial acknowledgment by the administrator, by the filing of an account and the prayer that it be homologated, is far more solemn and authoritative than any

writing under private signature, whether on the evidence of the debt or on a paper annexed to it, or in a letter.

The record does not show whether this debt was acknowledged otherwise than by placing it on the account; but if it had not been prescribed at the time that account was filed, it is not now prescribed; and plaintiff is, *prima facie*, a recognized creditor, and is fully authorized and empowered to demand of the administrator a full account of his administration, to the end that he may be paid, if there be funds, and he establish his claim.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and proceeding to render such judgment as should have been rendered by the parish court, it is further ordered, adjudged and decreed that Honoré P. Guilbeau, administrator of the succession of Dr. John H. Thomas do, within thirty days after he shall have received notice of the filing of this decree in the parish court of St. Martin, by service of a copy thereof to be issued by the said parish court, present and file, in said court, a full, true and perfect account of his administration of the said succession, and in default thereof that it be enforced according to law; and finally, that the costs of the proceeding in the parish court, and of this appeal, be borne by the said succession.

Mr. Justice DEBLANC, recused.

No. 1035.

THE STATE VS. VOORHIES TRAHAN ET AL.

The surety on the bail bond of one who is accused of a felony, and who is in prison awaiting sentence on a conviction of another crime, may effectively surrender the accused by a formal declaration to that effect to the sheriff, and have his bond validly canceled by the sheriff, without the necessity of going through the idle show of the sheriff leading the prisoner out of his cell, and the bail thereupon leading him back into it, and there formally delivering him to the sheriff.

APPEAL from the Sixteenth Judicial District Court, parish of Vermilion. *Mouton*, J.

Joseph A. Chargois, District Attorney, for the State, appellee.

C. H. Mouton, and *W. Mouton* for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant Trahan was indicted and tried for murder, and the jury failing to agree, he was admitted to bail during the interval between terms. The other defendants are the sureties on his bail bond.

He had been indicted for another offence, had been convicted, and

was in jail awaiting sentence. Just then, one of the sureties to the bail-bond in the murder case went to the sheriff and stated that he wanted to surrender the prisoner to him, to which the sheriff replied that "it was all right and he would cancel the bond." This was in the court house during the midday recess of the court. The sheriff informed Trahan the prisoner that his bail had surrendered him, and on same day wrote on the bond the following;—I hereby certify that Richard Leblanc, one of the bondsmen of Voorhies Trahan on the reverse hereof, has this day surrendered the said V. Trahan to me within the four walls of the jail of the parish. June 11, 1879. G. B. Shaw, Shff.

Four days afterwards Trahan broke jail and fled. The State's attorney had the bond forfeited in the usual way, and the sureties pleaded the surrender of their principal and the cancellation of the bond. The lower judge rejected the plea, holding that the surrender must have been made in open court, or within the four walls of the prison. The last clause of sec. 1033 Rev. Stats. is cited as conclusive of the question. It reads;—any surety may be relieved from responsibility by making a formal surrender of the defendant or party accused to the sheriff or his deputy, in open court, or within the four walls of the prison of the parish, and not otherwise.

The counsel of the sureties points out another mode of surrender under sec. 3569 Rev. Stats., i. e. "a surrender to the prison." It seems not to have occurred to them that this section is a misprint. As it is printed, it is nonsense. There is a line left out, which being supplied, it is an exact reproduction of sec. 1033.

The part of that section quoted above is the concluding sentence of sec. 2 of the Act of 1837, Sess. Acts, p. 99, and the State relies on the construction of it in State v. Martel, 3 Rob. 22. In the present case the surety could not bring the principal in open court, because he was in jail under a conviction in another case and was held for sentence thereunder. He was thus within the four walls of the prison. Must the surety have got access to the prison, and there in the sheriff's presence have surrendered the prisoner? The object of the requirement that a surrender must be made in open court or within the prison, and not otherwise, is to prevent a surety from doing that act in such way or at such time as will imperil the safe custody of the prisoner, as for instance, by delivering a principal to a sheriff when he has not the means to put him in custody. But if the principal is already in one of the places where the statute says he must be when surrendered, viz in prison, what need can there be for his surety to do more than to make a formal surrender of him in unmistakable language, and to receive from the sheriff a formal acceptance of such surrender in writing, as was done in this case by cancelling the bond?

If bail are not entitled to an *exoneratur* upon such surrender as this, then it would be necessary to hold that they must go through the dumb show of getting the sheriff to lead the prisoner out of his cell only that the bail might instantly lead him back into it, and there deliver him. What we are now holding was foreshadowed in Frith's case, 14 La. 490 where it was said, the bail might have been exonerated by a formal declaration to the sheriff, while the principal was in actual custody, that they wished to surrender him. In this case, not only was the declaration made and taken cognisance of by the sheriff, but he executed a formal release, and the surrender was complete.

The surrender was made by one only of the sureties, but a release of one enures to the benefit of all. State v. Doyal, 12 Annual, 653. All of them have appealed.

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favour of the defendants—sureties, releasing them from their obligation and for their costs in both courts.

No. 1048.

THE STATE VS. ELPHEGE ADAM ET AL.

If an accused person, against whom an information has been filed in the parish court, does not expressly waive a trial by jury, the information, and all the papers relating to it, must be instantly transferred to the district court which will thenceforward alone have jurisdiction of the case.

Where the affidavit supporting a motion for a new trial on the ground of newly discovered evidence, appears to be based on a rumor, and no pains were taken to bring forward the newly discovered witness at, or before the hearing of the motion, the motion is properly overruled.

A verdict that the accused is "guilty as charged," is responsive to the charge, if the crime is charged as the law directs or permits.

Where a clause of the criminal law enumerates several offences linked to the same act, or enumerate, disjunctly, the intent necessary to constitute each of the offences, such offences may be cumulated in one count.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie*, J.

Thos. L. Winder, District Attorney *pro tem.*, for the State.

E. W. Blake for defendant.

The opinion of the court was delivered by

MANNING, C. J. Three persons, Elphege, Leo, and Sivilien Adam were indicted for an assault with a dangerous weapon with intent to kill, and inflicting a wound less than mayhem. A *nolle prosequi* was entered as to the last named. The others severed. Both were con-

victed, were sentenced to one year's hard labour, and to pay a fine of one hundred dollars, and all costs. This is Leo's appeal.

An information had been filed in the parish court against these parties for the same offence. When afterwards this indictment was found in the district court, the defendants pleaded *lis pendens*. The criminal law does not know that plea, but the meaning of the pleader is obvious, and it may well be that the State would not be permitted to change the forum, once selected by her officer, for the prosecution of the offender, if he had himself done what was essential to fix the jurisdiction.

Accused persons, against whom informations are on file in the parish courts, shall decide whether they will waive a trial by jury before being required to make any motion or plea. If the accused does not waive that mode of trial, the information and all the papers relating to it are transferred at once to the district court. If he does waive it, his waiver must be entered on the minutes, and *then* the parish court shall take cognisance of the case. Rev. Stats. secs. 1076—7. The oral argument on this point was made on the assumption that the prisoner had waived the trial by jury, and therefore the jurisdiction of the parish court had attached. The prisoner had neglected or omitted to do that which it was necessary he should do, in order that the parish court should take cognisance of the case. His waiver of jury-trial must be entered on the minutes. This record does not contain any waiver, and the jurisdiction of the parish court did not attach in such sense as to prevent the State from prosecuting him in the district court.

A motion for a new trial was made on the ground of newly discovered evidence. The affidavit, supporting the motion, appears to be based on rumour, and the evidence was conjectural at best. No pains were taken to bring forward the newly discovered witness at or before the hearing of the motion, and we think the judge rightly overruled it.

A motion in arrest of judgment is made on two grounds; 1. that the verdict is not responsive to the charge, 2. that the indictment contains a charge of two distinct offences in the same count, viz an assault with a dangerous weapon, and an assault with intent to kill.

The first ground falls before the fact that the verdict is, guilty as charged, and we have only to ascertain whether the crime is charged as the law directs or permits.

Several offences, distinct in kind and degree, cannot be included in the same count, but this rule does not apply to cumulative offences denounced in the same clause or section of a criminal statute. Such clause or section may, and often does, enumerate several offences linked to the same act, or enumerate disjunctively the intent necessary to constitute each of the offences, and in such cases, they may be charged

cumulatively in one count. State v. Markham, 15 Annual, 498 and cases there cited.

This prosecution is under Rev. Stats. sec. 794 and reads;—whoever shall, with a dangerous weapon or with intent to kill, inflict a wound less than mayhem upon another person, shall on conviction, etc. The crime thus denounced was charged conjunctively and cumulatively, and the indictment is not amenable to the objection urged by the prisoner, which applies to a different class of cases.

Judgment affirmed.

No. 1047.

BOARD OF TRUSTEES OF NEW IBERIA VS. L. P. SERRETT.

The keeper or owner of a warehouse who has collected, on behalf of the authorities of a municipal corporation, a certain tax, levied by the corporation on packages of goods consigned to him, is estopped, when sued by the corporation for the amount of the tax, from setting up a want of authority in the corporation to impose the tax.

APPEAL from the Parish Court of Iberia. *Allison*, J.

Joseph A. Breaux for plaintiff and appellant.

W. B. Merchant for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The authorities of the town of New Iberia made regulations touching quarantine while the yellow fever was prevailing last year. One of them was that packages of goods and merchandize should not be brought within the town, or landed there by steamboats coming from the places infected with the fever. A police had necessarily to be employed to enforce this and other regulations, and extraordinary expenses had to be incurred in paying for this service. In order partially to assist in defraying the expenses of this police a tax of five cents on each package was laid by the town council or board of trustees. The defendant received as consignees or warehousemen enough packages to amount to one hundred and seventy dollars and 57 cents, and paid over $33.41, the receipts for September, and refused to pay any more on the ground that the tax was illegal, and unauthorized by the charter. This suit is brought to recover the residue of the sum collected by Serrett.

The defendant excepted;—"That the plaintiffs have no cause of action against defendant, because they are without authority in law, to establish and maintain a quarantine, and to impose upon defendant, and others engaged in the business of keeping warehouses for storage,

the burden of maintaining the same by requiring them to pay a tax of five cents on each package shipped to their care; that the trustees of New Iberia can impose no tax, or carry on the business of warehousemen and impose charges therefor, unless authorized to do so by the charter; that no such power or authority to do so is either expressed or necessarily, or rationally implied by the powers that are expressly granted them in the charter approved September 25, 1868, nor in any of the acts which said charter pretends to amend; that whatever power or authority that the police jury of this parish may have in the premises could not be transferred by them to plaintiffs."

The authorities of incorporated towns and cities are authorized to enact ordinances to protect them from the introduction of contagious and epidemical diseases. Rev. Stats. sec. 2452. The defendant concedes that, New Iberia being an incorporated town, its municipal authorities have power to enact and enforce all necessary police regulations to prevent vessels, goods, or persons from being landed within its limits when such landing might introduce contagious or epidemical diseases, but denies that they can by taxation raise the funds necessary to make the protection of these regulations effectual. The argument is, that the town can lay no tax not expressly authorized by its charter, and the taxation of the occupation of warehouse-keeper is not authorized by that charter.

We rest the case on wholly different grounds. It is alleged in the petition that the defendant under the ordinance of the town council collected the sum mentioned in the petition, and for the purposes of the present trial that allegation is taken as true. It is also alleged that he actively participated in encouraging the adoption of this and other ordinances to keep away the scourge that was then spreading terror through the land, and that he had assisted in maintaining these regulations, and in executing them—that the police jury co-operated with the trustees of the town in these matters, and adopted an ordinance on the same subject, and the defendant was a member of that body, and voted for it.

We apply the estoppel by conduct to the defendant. He treated the tax as legal, collected it, and it would be monstrous if he could now keep the money in his pocket under the pretence that he had no right to collect the tax because the corporation had no right to lay it.

On the general ground of the power of the authorities to make such regulations as are indispensable to the protection of communities from epidemic diseases, we should be inclined to go as far as the text and policy of the law would warrant. This court said in an early case;—"The police of cities require many regulations, which grow out of their situation, climate, and their population. An illustration of this may be found in the general recourse to quarantine regulations in warm

climates, and the rare resort to them in cold ones. In a city like ours, where a dreadful epidemic, frequently returning, checks its growth and occasions great mortality among the citizens, too much care cannot be taken to remove the causes which give rise to it. We have no doubt that the spirit and intention of the act of the legislature was, as its language indicates, that an extensive discretion should be vested in the city council. A much stronger reason than that now before us must be presented to induce the court to interfere, and say that regulations, having for their object public health, were beyond their power." Milne v. Davidson, 5 Mart. N. S. 410.

It is ordered and decreed that the judgment of the lower court, maintaining the exception and dismissing the suit, is avoided and reversed, and that the case be remanded to the lower court to be proceeded with in due course of law, and that the plaintiff have and recover of the defendant the costs of this appeal.

No. 1046.

SUCCESSION OF M. ROMERO. OPPOSITION OF MRS. SANDOZ.

An administrator cannot, by any form of acknowledgment, revive a prescribed debt of the succession.

All actions against tutors for debts due by them to the minors of whom they have had charge, and contracted during the period of the tutorship, are prescribed in four years from the majority of the minors. But debts of the tutor to the minor, arising after the termination of the tutorship, are not affected by the prescription of four years.

The debt due by a former tutor, on account of sums collected by him after the emancipation by marriage of the minor, is not secured either by the tutorship mortgage, or by the mortgage created by article 3315 of the Civil Code, in a case where there is no necessary connection between the after gestion and the administration as tutor, and where the duration of the gestion, the sums paid the ward, and all the facts, proved a knowledge, and consent on the part of the ward, thus creating an implied tacit mandate.

In the absence of proof of demand, interest on a debt due by a deceased former tutor, either as *negotiorum gestor*, or under a tacit mandate, only begins to run from date of his death.

APPEAL from the Parish Court, parish of Iberia. *Allison*, J.

R. S. Perry for opponent and appellant.

Jos. A. Breaux for heirs of Romero, appellants.

The opinion of the court was delivered by

WHITE, J. Michael Romero was appointed the tutor of the minor Sylvanie Romero, who was born on the twenty-second of July, 1852, who married Arthur Sandoz on the fourth of May, 1868, and became of

age on the twenty-second July, 1873. Romero, tutor, died in 1871. The administrator of his estate filed on the seventh of November, 1877, an account of his gestion, and in it included, what it seems was called, the account of tutorship of Romero with his former wards, Sylvanie and Odile her sister. This account charged the estate with various sums received by Romero, as tutor, at different dates, commencing on March 2, 1868, and ending in 1869, amounting in whole to $3163 75. No interest was allowed on the various items. Of this sum one half was stated as coming to Sylvanie Sandoz, and she was debited with various items from June 15, 1866, to July 2, 1870, amounting to $823 70. Thus the account as to the state of things between Sylvanie Romero and the estate of Romero was as follows:

One half of $3,163 75	$1,581 87½
Less sums due by her, or rather paid for her account	823 70
Balance in her favor	$758 17½

This account was opposed by Sylvanie Romero, wife of Sandoz, on the ground that interest on the items credited had not been allowed, whilst it should have been at the rate of five per cent on each and every item from the date of receipt, and on the further ground that each of the items charged as paid had not been so disbursed. She prayed amendment of the account in accordance with her opposition.

D. Romero, as an heir, and others, opposed the account on the ground that nothing was due Sylvanie, her claim being prescribed by four years, which prescription was pleaded. The same persons further opposed on the ground that a sum disbursed by the tutor for the board of the former minors had not been charged against them. The court below ordered that Sylvanie be placed on the account for $1275 50, with five per cent interest from seventh November, 1877, subject to a credit for board of $180. The administrator and the other heirs, who had opposed the allowance of the claim of Sylvanie, appealed. The points for decision, as presented by the records and argument of counsel, are embraced within the following inquiries:

1st. The action of the minor against his tutor, respecting the acts of the tutorship, being prescribed by four years, to begin from the day of majority (C. C. 362), can an administrator after the acquisition of prescription waive it?

2d. If not, did the pleaded prescription cover all the items; and if not, are such items, not covered by the prescription, secured by the minors' mortgage?

3rd. What interest, if any, is due upon the sum exigible?

4th. What is the amount due?

First and second. That an administrator has no power to waive or

renounce an acquired prescription is elementary. This being the case, it is obvious that despite the acknowledgment in the account those items, either of debit or credit, which were for sums collected by the tutor during the existence of the tutorship, or disbursements made during the same period, were prescribed when the account was filed. The opponent, Sylvanie, became of age on the twenty-second of July, 1873, the account having been filed on the seventh November, 1877, more than four years after majority. C. C. 362; Gilbert vs. Meriam, 2 A. 162; Bonnefoi vs. Wells, 10 A. 658; Gourdain vs. Davenport, 10 R. 174; Viola vs. Burguires, 19 A. 149.

The serious point of difficulty, however, is, did the prescription of four years apply to those items of the account representing sums collected by the tutor after the termination of the tutorship, by the emancipation of the ward consequent on her marriage in May, 1868? We think not, the prescription of four years, provided by C. C. 362, is one "respecting the acts of the tutorship," and acts done upon the termination of the legal relation of tutor and ward are in no proper sense of the words tutorship acts. The will of the law-maker and not that of the individual creates a tutorship; and, although the mind may conceive that a tutor who continued to act as such after the cessation of the tutorship by emancipation might be held to the responsibility of a tutor, as is provided by our law where one without authority acts as a tutor for a minor, this conception would not necessarily import that all the advantages of the short prescription would attach to such a gestion. Paul Pont, vol. 1, p. 497.

Says the same author in speaking of a state of facts for the purposes of inquiry, like the one before us: "Car l'émancipation légale acquise de plein droit et par le seul fait du mariage au mineur qui se marie, est irrévocable; elle subsiste même après la dissolution du mariage, bien que l'époux soit encore a ce moment en état de minorité, puisque la loi qui prononce l'émancipation par le mariage ne fait aucune distinction. Si donc l'émancipation subsiste, il n'y a pas de tutelle; et s'il n'y a pas de tutelle, il ne saurait y avoir d'hypothèque légale: c'est ce que la Cour suprême a reconnu, dans l'espèce en cassant l'arrêt qui en avait autrement décidé." P. 497.

Further, in speaking of a gestion by the tutor for account of the ward after emancipation or majority, he adds: "Le pupille ou ses ayants droit, s'ils ont laissé aux soins de l'ex-tuteur l'administration de leurs affaires, ont constitué par là une gestion nouvelle, qui n'est pas comme la tutelle, établie par la loi ni dans des conditions de temps et de durée auxquelles des conventions particuliéres ne peuvent rien ajouter." P. 501.

In fact to apply the four years prescription which begins from date of majority to sums collected after the termination of the tutorship,

would in many cases compel the application of a term of prescription beginning its career before the obligation had come into existence.

This court, upon principles analogous to the foregoing, said in Leverich vs. Adams, 15 A. 310, in speaking of sums claimed to have been collected by one who had been tutor, but who asserted for given reasons that the tutorship had ceased during the minority of the ward, when the collections were likewise made: "If his office terminated he became a *negotiorum gestor*, and the minor had his tacit mortgage as such under C. C. 3283." We do not think however that under the facts of this case the sums collected, and which we hold not barred by the prescription of four years, are secured by either the mortgage created by C. C. 3315 or the tutorship mortgage proper—not by that created by C. C. 3315, for one could not assume a tutorship of a person not subject to tutorship; not by the tutorship mortgage proper, for although, as taught by the greater number of civilians, it may be that the minors' mortgage secures sums collected after the termination of the tutorship up to the period when the action for account is barred, or the tutor discharged, yet even this rule, so applied, becomes inapplicable: First. Where there is no necessary connection between the after gestion and the administration as tutor. Second. Where the duration of the gestion, the sums paid the ward, and all the facts point to a knowledge and consent on the part of the ward, thus creating an implied or tacit mandate. Paul Pont, v. 1, p. 501; Marcadé, v. 5, p. 521. Both of which exceptions we find in the record before us. Nor do we think that the opposing of the account as a tutorship account should conclude the claim as a *negotiorum gestor*. The account was filed as a tutorship account, and was so in part. Even were the opposition of Mrs. Sandoz entirely disregarded, her claims would yet be on the account—the other opponents being actors seeking to have them stricken off on the ground of prescription—when the evidence is in the record, without objection, showing the plea to be untenable as to the items not collected during the tutorship.

We have not noticed many points urged by counsel, because we consider them practically passed on by the views we have expressed. Thus we cannot impute sums collected after emancipation to the amount claimed as due before, because the existence of such a previous debt cannot be ascertained in consequence of the pleaded prescription—*prius oportet esse quam operari*. So, also, we cannot consider the claimed sums due for board before the emancipation, or the complaint that they exceeded the power to spend, vested in the tutor. The sums charged as paid since the emancipation are admitted to have been disbursed. There is no proof as to their incorrectness. We think they should be allowed.

We think, in the absence of proof of demand, the sums being due either as *negotiorum gestor* or under a tacit mandate, interest is only due from date of death. C. P. 989; 6 L. 362. Stating, then, the account in accordance with the foregoing, we have—

Received for account of Sylvanie Sandoz, from June 9, 1868, to March 13th, 1869	$1,498 75
Charges against her from May 26, 1868, to July 2, 1870, and the sum of $50 in addition, as admitted in brief of counsel, gives	748 07
Balance due	$750 68

Of this sum $168 50, it is agreed, is to bear no interest.

It is therefore ordered that the judgment below be reversed; and proceeding to render such judgment as should have been rendered below, it is ordered that there be judgment recognizing Mrs. Sylvanie Romero, wife of Arthur Sandoz, as an ordinary creditor of the succession of M. Romero, in the sum of $750 68, with five per cent interest on $582 18 from first December, 1871, the latest date fixed as the period of the death of M. Romero. The costs of appeal to be borne by Sylvanie Romero, those below to be borne by the other opponents.

No. 1051.

EMILE BABIN, ADMINISTRATOR, VS. O. DELAHOUSSAYE.

The parish court has jurisdiction to issue an order of seizure and sale, where the amount involved is $500, exclusive of interest.

Where executory proceedings are taken in the parish court, all conflicting claims of privilege or mortgage on the property ordered to be sold, no matter how large the claims, must be brought in the parish court for classification and adjustment.

This court has not jurisdiction of an appeal from the judgment of a parish court, where the amount involved is $500, exclusive of interest.

APPEAL from the Parish Court of St. Martin. *Bassett*, J.

Felix Voorhies, and *L. J. Gary* for plaintiff and appellee.

J. E. Mouton for defendant and appellant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. Under executory process, issued by the parish court of St. Martin, at the suit of Maraist, Fournet & Co., Delahoussaye, then sheriff, on the first November, 1873, sold the mortgaged property for cash.

Emile Babin, in his capacity as administrator of the succession of widow Babin, filed an opposition, claiming the proceeds of the sale as mortgage creditor, with vendor's privilege; and the liquidator of the commercial firm of C. H. Mouton & Co. also claimed, by way of opposition, priority of right as mortgage creditors.

By judgment of 11th August, 1876, the parish court dismissed the opposition of the liquidator of Mouton & Co. as in case of nonsuit; and ordered the sheriff to pay to Babin the entire proceeds of the sale.

In July, 1878, Babin took a rule on Delahoussaye, who was no longer sheriff, to compel him to pay the proceeds in accordance with the judgment of 11th August, 1876. This rule was made absolute. St. Germain, the purchaser of the property at the sale, 1st November, 1873, and the liquidator of Mouton & Co., who were not parties to the rule, alleging their respective interests, appealed separately. Babin moves to dismiss for want of jurisdiction; and he alleges that, if the case be appealable, the appeal should have been taken to the district court.

The mortgage in favor of Maraist, Fournet & Co., under which the property was sold, was given to secure four notes, amounting to $500, exclusive of interest. We assume, therefore, that the parish court had jurisdiction to order the seizure and sale. Constitution, art. 87; Decklar's case, 30 An. 410.

The price of the adjudication to St. Germain was $1745; and the amount claimed by the opponents respectively, was about $1300, exclusive of interest. The law requires conflicting claims of privilege and rights of mortgage to be adjusted and classed in the court under the process of which the sale is made. Rev. Stats. sec. 2903; R. C. P. art. 126. Adams vs. Daunis, 29 An. 420. We assume, therefore, that the parish court had jurisdiction of the oppositions, and to enforce the payment of the proceeds in the hands of the sheriff, in accordance with its decree settling the question of privilege and preference.

The jurisdiction of this court, in civil cases, "when the matter in dispute shall exceed $500," is fixed by the constitution, art. 74, beyond question. The appeal is direct to this court in criminal cases falling within its jurisdiction; and in cases in which the constitutionality or legality of any tax * * * or any fine * * * imposed by a municipal corporation shall be in contestation. If art. 74 stood alone, the appeal would be direct to this court from the tribunal in which the case originated; but arts. 85 and 87, in plain terms, give appellate jurisdiction to the district courts in all ordinary civil cases "when the amount in contestation exceeds $100, exclusive of interest." Article 88 gives an appeal directly to this court "in all probate matters, when the amount in dispute should exceed $500, exclusive of interest." With these exceptions there is no direct appeal from the parish courts to this court.

We had occasion to consider this subject in Newman vs. Cuney, 30 An. 1201; and our conclusion was that when the capital sum in controversy was above $100, the appeal from the parish court was to the district court; and if the interest and capital should exceed $500, an appeal would lie from the district court to this court.

We limit our decree to the simple decision that we have no jurisdiction of the appeals taken in this case; and the rights of all parties in interest are reserved, precisely in the condition in which they would have been if no appeal had been taken.

The motion to dismiss is maintained; and the appeals are dismissed at the cost of appellants.

Mr. Justice DeBlanc, being recused, takes no part in this decision

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No. 1039.

Succession of François Feray.

The amount of the bond to be given by a testamentary executor, when demanded by a creditor of the succession, is fixed by law at one fourth above the amount of the debt claimed. Neither the clerk, nor the judge has any authority to fix the amount.

If the security demanded by the creditor is not given by the executor within thirty days after service of the order of the court requiring it, the office of executor is, *ipso facto*, vacated, and the judge is required to appoint a dative testamentary executor. In such a case no suit for the removal of the executor is necessary.

APPEAL from the Parish Court of Vermilion. *Lyons*, J.

O'Brien & White for applicant and appellee.

F. R. King, and *R. C. Smedes* for opponent and appellant.

The opinion of the court was delivered by

Marr, J. Lastie Broussard, in his capacity as administrator of the succession of LeBlanc, claiming to be a judgment creditor of the succession of François Feray, and that the sum of $283 75, or thereabouts, in principal, interest and costs, remained unpaid, prayed that the testamentary executrix, Mrs. Virginia Stokes, widow of Feray, be ordered to give bond as the law requires in such cases. The petition was sworn to; and the judge ordered the executrix to give bond and security "as prayed for, and as directed by law, in such cases, within thirty days from the date of service," etc.

Lastie Broussard was clerk of the court; and he issued the notice commanding the executrix to give "the bond and security required by law within thirty days, * * * in the sum of $353 68, to secure the

claim of the petitioner, Lastie Broussard, administrator, * * * which amounts to about $283 75." This notice, with copy of the petition, affidavit and order of the judge, was served on the executrix in person. More than thirty days after the date of this service Leon Feray presented a petition to the judge, alleging the failure of the executrix to give the security as required, and praying to be appointed dative testamentary executor. The executrix opposed this application on the ground that she had not been removed, and that she could be removed only by a direct proceeding for that purpose, or by an appeal from and reversal of the judgment admitting the will to probate. The judge dismissed her opposition; and she appealed.

The clerk had no authority to fix the amount of the bond to be given by the executrix. It was the business of the judge to make the order requiring security to be given; and it was the duty of the clerk to issue a copy to be served. The amount mentioned in the notice was not in excess of the requirement of the law; but the duties of clerks of courts are purely ministerial, and they cannot supply actual or supposed omissions in judicial orders. The clerk should have been specially careful to confine himself to his official duty in this case, because he was the petitioning creditor.

The law fixes the amount of the security to be given in such cases at one fourth above the amount of the debt claimed; and the judge had no more authority to fix the amount than he would have had to fix the amount of a bond for a suspensive appeal from a money judgment.

The right of the creditor to demand security in such cases is absolute; and the law makes it the imperative duty of the judge to order the security to be given within thirty days after service of the order. The only notice required is the service of a copy of the order of the judge; and the failure of the testamentary executor to comply with it works, *ipso facto*, his immediate removal, and requires the judge to appoint a dative executor. R. C. C., art. 1677.

It was the duty of the executrix, within thirty days after service, to have given or offered to give bond and security for an amount exceeding by one fourth the amount due on the judgment against her testator. The petition of Broussard states the amount with sufficient certainty; and it gives the number of the case, on the docket of the parish court, in which the judgment was rendered, so that the precise amount could have been ascertained without inconvenience or delay; and the fixing of the amount of the bond would have been a matter of the simplest calculation. The failure of the executrix to give the security left no discretion to the judge. Her removal, the vacation of her office, took effect immediately, by mere operation of law; and the parish judge was compelled to appoint a dative executor. He had no power, and we have

none, to relieve appellant of the consequences of her neglect to observe the requirement of the law; and her opposition was properly dismissed.

The Code of Practice, articles 1017, 1018, requires suits for the removal of tutors, curators, executors, and other administrators of successions, to be commenced by petition and citation, and to be conducted in the usual form. These articles control, and are to be observed wherever it is necessary to bring suit for the removal of any one of the administrators mentioned. But in this case there was no proceeding to remove the executrix, nor was any necessary. The creditor availed himself of the legal right to demand security for his debt. The executrix failed to give the security as required by law and by the order of court; and her removal was the immediate legal consequence, by the terms of the R. C. C., art. 1677.

The judgment appealed from is affirmed with costs.

No. 989.

JOSEPH DEJEAN VS. CLEMENT HEBERT ET ALS.

The vendor has, for the security of the unpaid portion of the purchase price, a privilege on the thing sold. That privilege exists by mere operation of law, and need not be reserved by any stipulation in the act of sale.

An act of mortgage in which the debtor acknowledges the debt secured by the mortgage, imports a confession of judgment, and under such an act executory proceedings may be instituted.

The plaintiff and his surety in an injunction suit, restraining the execution of an order of seizure and sale, can not be held liable in damages, except by an action on the bond.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

John N. Ogden for plaintiff and appellant.

F. Perrodin for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the 12th of May, 1872, Clement Hebert sold to Joseph Dejean a plantation, situated in the parish of St. Landry, for the price of $1700, payable as hereafter mentioned, to wit: $500 on the day of the sale, $500 on the 1st of January 1874, and the balance on the 1st of January 1875. For the credit portion of the price, Dejean furnished two notes, which were not paid at their maturity.

On the 24th of November 1876, Clement Hebert applied for and obtained an order of seizure and sale, commanding the sheriff to seize and sell the plantation conveyed by Hebert to Dejean, to satisfy the balance due by the latter to the former. At the foot of the petition praying for the seizure and sale there is the order granting the creditor's applica-

tion, and—under it—the following declaration signed by Dejean: "I accept service of the preliminary notices required by law, and waive all legal delays, provided the property be not sold before the 1st of January 1877."

In accordance with the order of the court, and at the date fixed by the agreement, the sheriff was proceeding to execute the writ of seizure and sale, when he and the creditor were enjoined and prohibited from selling the property seized, on the grounds:

1. That it does not appear that Dejean gave a privilege or mortgage to secure the payment of the notes sued upon.

2. That, as no such declaration is to be found in the act of sale, that act does not import a confession of judgment.

The district court dissolved the debtor's injunction, rejected the creditor's claim for damages, and reserved the latter's right of action on the injunction bond. The debtor has appealed.

The decision of the lower court conforms to the facts and the law.

The creditor may renounce to his mortgage and privilege, as vendor; but the vendee who takes the property, without paying the price, cannot, by any special acknowledg ment of a privilege conferred by law, add to his vendor's right: that right, that high privilege, needs no acknowledgment of the debtor, no declaration of the notary, to exist, to follow, to remain attached to the property, until satisfaction of the price and every fraction of the price.

Rev. C. C. 3249.

"Ce que la loi protège essentiellement, ce qu'elle met sous la sauvegarde du privilège, c'est la transmission de la propriété; ce qu'elle veut assurer, c'est l'éxecution dans toutes ses parties, dans toutes ses conséquences, du contrat par lequel le propriétaire abandonne sa chose et la livre sous la condition de recevoir en retour les sommes ou les valeurs qui sont le prix en vue duquel il s'est dessaisi. Donc la faveur du privilège s'attachera aux conventions de l'espèce dès que la transaction aura le caractère et les effets de la vente, bien que l'acte qui la constate n'en porte pas la qualification."

Paul Pont on the 2103d art. of the N. C.

That, though it was not specially reserved, Hebert has a privilege, is not only not denied, but admitted. It is urged, however, that—in form—the act on which he relies does not import a confession of judgment. That distinction is not in the law; a privilege asserted by the Code is not inferior to a privilege asserted by the notary's pen.

The act from Hebert to Dejean was passed before a notary, and in the presence of two witnesses. In that act Dejean acknowledged the identical debt for which he is sued. That act, and the notes identified with it by the notary's paragraph, evidence a contract secured by a

privilege. That act imports a confession of judgment, and under its terms and the law, the creditor was entitled to executory process.

C. P. 732, 733, 734.

The order of seizure and sale is so far a judgment that it can be appealed from; but it is not a judgment in the true legal sense of the term; it does not possess all its features. It is granted without citation, decides no issue, adjudicates no right in addition to those mentioned in the act, and the party enjoining such an order can—with his surety—be held liable but by an action on the bond.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby affirmed with costs.

DISSENTING OPINION.

MANNING, C. J. The executory process of our law is an extraordinary and anomalous remedy. It disregards and contemns the ordinary legal forms of procedure by which a forced alienation of property may be made, and accomplishes its purpose with a swiftness more in accordance with military usage than with civil routine. The celerity of its motion is equalled only by the indifference with which it overrides the legal requirements of every other species of procedure. Without citation or notice, without trial or judgment, the creditor holding a peculiar kind of authentic Act presents that Act with the evidences of his claim to the judge out of court, and then and there obtains a peremptory and unqualified mandate to seize the debtor's property described in the Act, and not until then is he required to inform any one but the judge of his intentions or purposes. A brief delay is given to the debtor to pay, and failing that, the advertisement incontinently follows.

The employment of such process should not be permitted beyond the limit prescribed by law for its exercise. It should not be applied to any cases except those plainly and unmistakably within the purview of the legislation which created it. It can be resorted to when the creditor's right arises from an act importing a confession of judgment, and which contains a privilege or mortgage in his favor, Code Practice, art. 732—3. And an act is said to import a confession of judgment in matters of privilege and mortgage, when it is passed before a notary public in the presence of two witnesses, and the debtor has acknowledged or declared the debt for which he gives the privilege or mortgage.

The Act upon which the process issued in this case is notarial, and that is the only respect in which it complies with the requirements of the Code. There is no mortgage recited, no privilege retained, no declaration or acknowledgment of a debt made, but simply, barely, and

solely the words necessary to inform the reader that a sale has been then and there made.

I am not oblivious of the legal principle that the privilege of the vendor exists by operation of law, and independent of the convention of the parties, or rather that it springs out of that convention by a sort of spontaneous birth, the result of the contact of these two consenting minds. And therefore if the vendor, suing upon the notes of his vendee, should demand the recognition of his privilege, it would be accorded him, although no stipulation to that effect were found in the Act of sale. It would be vain for the vendee, pursued *via ordinaria*, to deny the existence of the privilege because it had not been formally recited in the Act of sale, since the law created the privilege, and attached it to the vendor as a right for him to enforce in security of the notes given for the purchase price.

But does the law create the privilege, and also attach it so firmly to the vendor that he cannot shake it off—that he cannot expressly renounce or tacitly waive it? And when in order to entitle him to a process, which leaps by one bound over all the stages of a suit, he must have an Act which *contains* a privilege or mortgage, and there must be within it a *declaration* or *acknowledgment* of the debt, can he obtain such process when the Act itself does not contain either privilege or mortgage, or declaration or acknowledgment of the debt?

It is the law that holds in its bosom—*in gremio legis*—the privilege which secures the price of sale. The Act does not contain it. It is wholly outside of the Act. The single line that the vendor hereby retains the privilege accorded him by law would have made the act contain it. The law of registry has assumed new aspects from modern legislation. How is one to know that a hidden privilege lurks beneath verbiage which does not advise one of its existence? The special feature of our recent legislation relative to registry is the care taken to provide for recording all liens so that an inspection of the recorder's books may shew all incumbrances. Must you not only read what privileges are created or retained, but also by another mental process evolve a privilege out of recitals which do not express it? In this particular instance the waiver of the privilege, inferrible from the absence of any recital, is made probable by the fact that the Act was recorded only in the conveyance book.

The Act is markedly free from either declaration or acknowledgment of the debt, save the statement that the purchase is made and the notes given. After opening in the usual form, it recites the appearance of the vendor, who declared that for the consideration hereinafter mentioned, he does by these presents grant, bargain, sell, convey, transfer, assign and setover, with full guarantee against all troubles, debts, mort-

gages, claims, evictions, donations, alienations, or other encumbrances whatever, and with subrogation to all his rights and actions of warranty against all previous owners and with full guarantee of title unto Joseph Dejean, a resident of the parish of St. Landry, here present and accepting for himself his heirs and assigns, the following property:

Here follows the description of the property, and then proceeds;—This sale is made and accepted for the price and sum of seventeen hundred dollars, payable as follows: The sum of five hundred dollars paid cash on this day; receipt of which is hereby acknowledged. The sum of five hundred dollars, payable on the 1st day of January, 1874, and the balance seven hundred dollars payable on the 1st day of January, 1875, for which sum said purchaser has furnished his promissory notes, in conformity to the above stipulations, bearing eight per cent per annum interest, after respective maturity until final payment of capital and interests, said notes being marked by the notary "Ne Varietur" for identification with this act. Purchaser freeing the undersigned notary from the production of the certificate of mortgage required by article 3328 of the Louisiana Civil Code. Thus done and passed in my office in the town of Opelousas in presence of, &c. &c.

The recital here is that the vendee has made the debt, not acknowledged it—has furnished two notes, not specifically declared its existence. But what need for an acknowledgment of a debt from one who has just declared that he has made it? None, so far as the validity and binding force of the debt is concerned. But when the law requires it in order to entitle one to a peculiar and exceptional remedy for its enforcement, the answer properly is, *ita lex scripta est.*

My opinion is that executory process cannot legally issue upon a notarial act containing no more than is recited in that above quoted, and that the injunction of plaintiff should be sustained and perpetuated, reserving to defendant the right to pursue his debtor *via ordinaria* for a judgment upon his notes and a recognition of the privilege which the law has given him for the security of their payment.

MARR, J. I concur in the foregoing opinion of the Chief Justice.

No. 1038.

HALL & LISLE VS. MRS. MARY P. WYCHE.

The authorization of a judge to a married woman to borrow money, and execute a mortgage to secure the payment thereof, does not bar the wife from proving by oral evidence that no money was actually borrowed by her, and that her mortgage was really given to secure an antecedent debt of the husband.

Where there is no proof to the contrary, the plantation of the wife is presumed to be cultivated and administered by the husband, for the benefit of the community; and where mules are bought by the community and put on the plantation, they do not become immovables by destination, or necessarily a debt of the wife.

APPEAL from the Third Judicial District Court, parish of Iberia. *Fontelieu*, J.

Jos. A. Breaux for plaintiffs and appellants.

R. S. Perry for defendant and appellee.

The opinion of the court was delivered by

WHITE, J. The plaintiffs seek to enforce the payment of the balance remaining due on two certain notes drawn by the defendant with the authority of her husband, and secured, or purporting to be secured, by mortgage on certain property in the parish of Iberia. The defendant resists on the following grounds:

That the amount sued for is not due by her, the notes evidencing the same representing the debt of her husband for which she was incompetent to bind herself or her property; that the act of mortgage covered three notes, amounting to $1124 81, of which sum $750 represented the purchase price of five mules sold her by the plaintiffs for her separate use, and the remainder, $875, evidenced a debt due plaintiffs for mules previously sold her husband; that the plaintiffs were aware that the debt was due by her husband when the mortgage was consented to and the notes given; that she had paid on account of the notes the sum in principal of $877 33, which along with the interest constituted a payment made by her in error in excess of the amount due of $80 57, for which she prayed judgment in reconvention. She charged the nullity of the authorization of the judge, granted under C. C. 126, 127, because it did not specify the amount which she was authorized to borrow, and because the certificate did not and could not have authorized her to bind herself for her husband's debts, antecedently contracted to the knowledge of the person dealing with her on the faith of the power which it purported to convey.

The judgment below rejected the plaintiffs' demand, as also the reconventional demand. The plaintiffs appeal.

The facts shown by the documentary evidence are as follows: On the third of March, 1873, the defendant, after examination as required

by law, was authorized to contract a debt to the extent of $3000, and to secure the payment of the same, or any part thereof, by the mortgage of her separate property; that on the third of March, 1873, by act before Joseph A. Breaux, notary, she acknowledged herself indebted to the plaintiffs in the sum of $1624, evidenced by her three promissory notes of date the third March, 1873, payable respectively on the fifteenth days of January, 1874, 1875 and 1876—the act reciting that the authority "to mortgage said property is hereto annexed;" the certificate to which we have already referred being annexed to the act. The payments alleged by the defendant are unquestioned, and the issues as presented by brief of counsel involve the liability of the defendant for the amount which she charges was a debt of her husband.

On the trial the plaintiff objected to the introduction of oral testimony, that of defendant, to substantiate the answer: 1st. Because the defendant had obtained previous to executing the act of mortgage referred to in plaintiffs' petition the authorization to execute the same. The said authorization makes full proof against her that the contract inured to her benefit. 2d. Because she cannot question now, by alleging error, which is not substantiated, the correctness of the authorization.

These objections were overruled, and we think properly so. Grant, for the sake of examination, that the certificate of a judge, given under C. C. 126, 127, has the force and effect of the thing adjudged as against the married woman acting under it, thereby irrevocably closing the door to all inquiry as to the use of money borrowed, the objection would be none the less untenable because the defense was not an attempt to show that money borrowed under the authority was applied to the husband's debts, but a charge that nothing was ever borrowed under the authority; that the plaintiff, an antecedent creditor of the husband, had not only in *fraudem legis*, but in violation of the terms of the authority obtained under its apparent sanction—the promise of the wife to pay the husband's existing debt. O'Keefe vs. Handy, not yet reported.

The proof establishes the defense. It consists of the testimony of the defendant, who swears point blank to the facts of the answer. It is urged that, inasmuch as she testifies that the mules sold her, and those previously bought by her husband, were by him placed on a plantation which she admits belonged to her *at the date of the mortgage*, therefore she is bound for their price, as placing them on her property made them part thereof as immovables by destination, hence a purchase for her account. There is no evidence showing the ownership of the property *at the date of the purchase of the mules*, or at the time they were placed thereon. Granting that the plantation was at that date the property of the wife, there is no proof that the wife administered it.

In the absence of proof, the husband is presumed to administer. C. C. 2386. Davis vs. Robertson, 14 An. 281. Being under the administration of the husband, the fruits fell into the community. C. C. 2386. The purchase and use by the community, of mules to cultivate its own crop, did not *ex necessitate* create an obligation of the wife, nor did the placing of the mules on the wife's separate property, which was being cultivated by and for the benefit of the community, make them immovables by destination. The community was a mere usufructuary, not the owner of the plantation. C. C. 468. For this reason the cases of Pinny vs. Bloom, of Twichel vs. Avary, of Dickerman vs. Reagan, and other authorities cited, and relied on by counsel, are inapplicable. Of course were the facts of this case like those of Davis vs. Williams, 29 An. 298, the pinciples therein taught would be applicable, but they are not. There the wife was shown to have administered, but here such is not the case. Even were the statement of the appellants' counsel, "that the mules are on her plantation," borne out by the record, the case might fall within the grasp of Jordan & Co. vs. Anderson, 29 An. 751. Such, however, is not the fact. The only evidence on the subject is that of the defendant, who testifies that the mules purchased by the husband were dead when the notes were furnished, with the exception of one or two; and there is no proof of the value or price of those so mentioned.

The judgment below we consider as only one of nonsuit. We therefore see no reason to remand the cause. The judgment is affirmed with costs.

No. 1057.

POLICE JURY OF VERMILION PARISH vs. JOHN A. BROOKSHIER, TAX COLLECTOR, ET AL.

It is not necessary to pursue a defaulting tax collector and his sureties for money collected and not accounted for by him, in the form of an ordinary action. They may be proceeded against summarily, by rule, whether the collector was appointed before or after April 20, 1877.

After a tax collector has acted under the ordinances of a police jury, and collected the taxes laid by them, he nor his sureties can contest the legality of those ordinances.

Where the delay in proceeding against a defaulting tax collector has not prejudiced his sureties' right of subrogation, they can not complain of the delay.

Where each of the sureties of a tax collector has obligated himself for a specific sum, each can be held only for that sum, and all of them can be held for no more than the full amount due by the collector to the State.

A tax collector is *prima facie* liable for the whole amount of his assessment roll, and if he fails to pay in that amount at the proper time, the whole burden of proof is on him to show discharge, payment, or whatever other defence he may have, in extinguishment of his liability.

Police Jury of Vermilion Parish vs. Brookshier, Tax Collector, et al.

A defaulting tax collector can not offer in evidence delinquent rolls of former years, not verified by the oath of the collector, and which are, moreover, fraudulent.

Where the refusal of the judge to pass on an exception before going to trial, has not injured the defendant, as where the exception was overruled, the defendant can not complain.

The judge may conclude in open court a trial begun in chambers.

The tax collector of a parish has no right to pay, out of taxes collected by him, a judgment against the parish.

A defaulting tax collector is entitled to recover nothing for his services, and hence can not prove the value of those services.

A tax collector is not entitled to a credit for election vouchers, or witness certificates, when it does not appear that they had not been received by him in payment of taxes.

APPEAL from the Sixteenth Judicial District Court, parish of Vermilion. *Mouton*, J.

W. A. White, parish attorney, and *F. R. King* for plaintiffs and appellees.

W. W. Edwards, Mouton & DeBaillou, R. P. C. Bryan, and *Posey & Posey* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff instituted this suit against John A. Brookshier, and the sureties on his bonds as tax collector of Vermilion parish, to recover $30,969.87 and two per centum a month interest, alleged to have been collected by him during 1875 and 1876 and not accounted for. The proceeding is by rule, and the defendants excepted;

1. That being a demand for a balance of account, the proceeding should be an ordinary action to establish and determine that balance, after citation and ten days notice.

The law expressly provides a summary proceeding against defaulting tax collectors, and always has provided it. In the early years of the State, the State Treasurer issued an execution upon the account as stated in his own books. Sec. 70 of the Act of April 20, 1877, is a reprint of sec. 3308 Rev. Stats. 1870, which is a reprint of sec. 71 of the consolidated revenue laws of 1855, Rev. Stats. 1856, p. 475, and that is but a reproduction of an anterior law. Our reports abound in cases, every one of which was by rule or motion under a law having the identical provision of that under which this rule is taken. A writ of distress even was once permitted. State v. Winfree, 14 Annual, 643.

2. This summary proceeding can be applied only to tax collectors appointed under the Act of 1877, and not to former collectors who have gone out of office.

The same remedy, enacted *in totidem verbis*, existed at and long before this tax collector's time.

And so of the rest of the numerous exceptions. The answer to all

of them is that from the beginning our laws have contrived summary proceedings upon tax collectors' bonds, the object of all of them being to enable the State or parish to proceed at once against the officer and his securities, and to prevent the interposition of the delays that are incident to ordinary actions. Some of these exceptions are frivolous. For example, the 8th is that all proceedings on these bonds must be brought in the name of the obligees, and not in the name of the police jury, by which is meant, that the bonds having been given to a former president of the police jury, a succeeding president of that body cannot bring suit upon them.

On the merits the defences are as numerous, and as unsubstantial as the exceptions.

The sureties allege that the parish taxes which were levied exceeded the maximum that could be legally collected. They were levied by ordinances of the police jury, and they were collected by their principal, and they cannot contest the legality of those ordinances after he has acted under them and collected the taxes laid by them. McGuire v. Bry, 3 Rob. 196.

The sureties claim a release because of an alleged delay of the police jury in enforcing a settlement by Brookshier. Their complaint is that the plaintiff was so dilatory in commencing proceedings as to imperil their safety, but when proceedings were commenced the complaint is that it was going too fast, and should be delayed by being subjected to the stages of an ordinary suit. It is not shewn, nor even pretended, that whatever delay there was in instituting proceedings either impaired or destroyed their right of subrogation, or any other right. The right of subrogation is indeed the only one that could be impaired by delay, and it was not affected in any manner by tardiness in instituting this proceeding. The surety is discharged when he loses his right of subrogation. The mere delay to sue does not of itself produce that effect. Barnes v. Crandell, XI Annual, 119.

The sureties claim the benefit of division. Their obligation is several up to the full amount for which each has signed. When sureties to a defaulting tax collector's bond have obligated themselves, each for a specific sum, the State is entitled to judgment against each one for the full sum for which he is bound, but no more can be collected from them all than the full sum due the State by the defaulting collector. Copley v. Dinkgrave, 7 Annual, 595.

The counsel for the plaintiff correctly observes that the process of computing the debits and credits on a tax collector's account is very simple. He is charged with the sum total of the rolls and of the licenses, and it is for him to offset these by legal vouchers for legal payments, and by a delinquent list made in due form. The tax collector is

presumed to have collected all that is on his roll and his number of licenses, and if he does not settle by a given day, he is a defaulter *ipso facto*. Every thing is presumed against him. He is *prima facie* liable for the whole amount of the assessment roll, and the onus of proof is upon him to shew discharge, payment, etc. Scarborough vs. Stevens, 3 Rob. 147. Vermilion Parish v. Comeau, 10 Annual, 695.

For the purpose of establishing a credit, a receipt of Nunez, the successor of Brookshier, for the delinquent rolls of former years was offered, and the rolls were offered in evidence also. They are not verified by the oath of the collector, and have not therefore the form required by law, and they are besides fraudulent, it appearing from tax receipts in evidence that many of the persons returned therein as delinquent had paid to Brookshier. He was entitled to a credit for such sums as his successor collected, which is proven to be $4,938.95, and it has been given.

Several bills of exception were taken.

1. To the refusal of the judge to pass upon the exceptions previous to going into the trial.

We have more than once had occasion to observe that the practice of referring all sorts of exceptions to the merits is vicious, and ought not to be indulged in by the lower courts. Sometimes a decision upon an exception settles the controversy, at least in the form then presented, and if made in the outset would terminate the case. That would not have resulted in this case, since the judge overruled all of them, and the defendants have not been injured by the course complained of.

2. To the judge's proceeding with the trial of the case in open court after it had commenced in chambers.

The trial of the case had been commenced in chambers under the Act of 1873, Sess. Acts p. 181, and not having been completed when the regular term of court commenced, it was proceeded with in court. The purpose of the law in permitting the trial in chambers is obvious. It could take place either in term or between terms—either in court or in chambers. The object was celerity, and the objection of the defendant that a new tribunal was created thereby, not recognized by the constitution, viz a judge sitting in chambers to hear and determine a cause, needs no further notice than to state it.

3. To the rejection of three receipts for money paid by Brookshier in payment of a judgment.

It was rightly held that he was without authority to pay over money to the creditors of the parish. The judgment he paid was reversed on appeal. He paid wrongfully in a double sense—prematurely, before the judgment was final—illegally, because without authority to pay at all.

4. To a ruling disallowing proof of the value of his services rendered in making the parish assessment rolls of 1875 and 1876.

His commissions are his compensation. His defalcation forfeits them. He cannot recover them under the guise of a claim on a *quantum meruit.*

5. To a ruling excluding certain election vouchers and witness certificates as credits.

It did not appear that they or any of them had been received in payment of taxes. A tax collector cannot pay or purchase such claims against a parish.

The lower judge has given a patient and intelligent hearing to all of the defences. His judgment is for three thousand dollars with interest at two per centum a month "from judicial demand," which he would have discovered to be August 30, 1877, if he had taken the pains to look for the service of citation, and by inserting its date in his judgment made it unnecessary for any one to look outside of the judgment to ascertain the date from which interest is to be calculated.

Judgment affirmed.